Fasulo, 13 P. D. 67. To reach this same conclusion in the absence of such a provision is a desirable result, scarcely justified by previous interpretation of the Statute of Frauds, but founded upon the sound reason that in requiring the attesting of a will the statute meant that all essentials to a valid will be witnessed, including the testator's signature. See *Ellis* v. *Smith*, *supra*.

WILLS — MUTUAL WILLS — REVOCABILITY. — A husband and wife, whose property consisted chiefly of a joint tenancy in leaseholds, executed wills found by another court to be mutual. After the husband's death, the wife executed a new will altering her previous will. The plaintiffs propounded the later will and the defendants claimed under the earlier. *Held*, that the later will must be probated. *Walker* v. *Gaskill*, 49 L. J. 456 (Prob. Div.).

Where a will is the result of fraud the probate court has jurisdiction to set it aside, and equity will ordinarily not be called upon to give relief. *Case of Broderick's Will*, 21 Wall. (U. S.) 503; *Allen* v. *M'Pherson*, 1 H. L. Cas. 191. But where the will is made in violation of a promise to devise or to die intestate, it must be recognized as the will of the testator by the probate court. The remedy is then in equity. *Ridley* v. *Ridley*, 34 Beav. 478; *Kundinger* v. *Kundinger*, 150 Mich. 630, 114 N. W. 408; *Taylor* v. *Mitchell*, 87 Pa. 518; *Jones* v. *Abbott*, 228 Ill. 34, 81 N. E. 791. Equity cannot order a new will or cancel the old, and so the relief is not precisely specific performance. Nor is it exactly a constructive trust remedy, for the measure of damages is not the enrichment of the estate or its wrongful beneficiaries, but what the promisee would have received. Courts and text-books, however, use the language of both remedies. See *Bolman* v. *Overall*, 80 Ala. 451, 455, 2 So. 624, 626; *Burdine* v. *Burdine*, 98 Va. 515, 519, 36 S. E. 992, 993. See GARDNER, WILLS, p. 85 *et seq.* The finding that wills are in fact mutual is equivalent to the finding of a contract to make wills, and equity would therefore exercise this peculiar jurisdiction in the nature of specific performance in the principal case, if called upon. *Dufour* v. *Pereira*, 1 Dick. 419; *Bower* v. *Daniel*, 198 Mo. 289, 95 S. W. 347. See STORY, EQUITY JURISPRUDENCE, 13 ed., § 785; 1 JARMAN, WILLS, 6 Eng. ed., pp. 41–42. It is this jurisdiction which accounts for the loose expression that mutual wills are "irrevocable in equity." It should be noted, however, that some courts, on the facts, are as reluctant to find mutual wills as they are to find a simple contract to devise. *Lord Walpole* v. *Lord Orford*, 3 Ves. Jr. 402; *Edson* v. *Parsons*, 155 N. Y. 555, 50 N. E. 265; *Hamlin* v. *Stevens*, 177 N. Y. 39, 69 N. E. 118.

BOOK REVIEWS

THE MINIMUM WAGE. By Rome G. Brown. Minneapolis: The Review Publishing Company. 1914. pp. xv, 98.

This is a significant little volume. It is another illustration of the tendency to deal with constitutional questions realistically and not as though they were a jejune branch of metaphysics. Less than four years ago the New York Court of Appeals, after paying a passing tribute to the irrelevance of the economic and sociologic data with which the Workmen's Compensation Law was sought to be justified by the Wainwright Commission, turned to the "purely legal" phases of the controversy. Now Mr. Brown, one of the leaders of the

Middle West bar, discusses the economic and ethical aspects of the minimum wage proposal as indispensable factors in determining the "purely legal" constitutional issue. This change of the method of approach is perhaps the single, most vital, contribution of constitutional law during the last few years, — the growing recognition on the part of bar and bench that the constitutional questions raised by social legislation are not to be determined by mechanical, immutable standards, but involve social philosophy, conscious or unconscious, and must be decided in relation to the evidence and claims urged by the other social sciences.

The Workmen's Compensation Law has become practically an accepted commonplace of our legislation, either through necessary state constitutional amendments or through a temper of interpretation different from that of the New York Court of Appeals. The most immediate contentious piece of legislation is the minimum wage proposal. Ten states have already enacted a measure in one form or another, ranging from the Massachusetts law, which merely calls for publicity of the findings of the Minimum Wage Commission without compulsory enforcement of such findings, to the very crude form of the Utah statute which, for all female workers, fixes a flat legislative wage; and in a number of states commissions are at work to report on the proposal. The Oregon law has been sustained by its Supreme Court (see *Stettler* v. *O'Hara*, 139 Pac. 743, 28 HARV. L. REV. 89), and the case is now before the Supreme Court of the United States.

Mr. Brown is immediately concerned with the Minnesota law, but with characteristic thoroughness he examines the underlying theories of this social measure, makes some reference to foreign experience (though nothing like the evidence that can be marshalled), and then considers what, to him, are controlling constitutional objections to this legislation, and particularly in its Minnesota form. Mr. Brown's elaborate attack really reduces itself to a conception as to the limitations of the Fourteenth Amendment which the Supreme Court of the United States in its recent decisions has refused to set. Our author discusses decisions like the *Muller Case* (208 U. S. 412) and *Noble State Bank* v. *Haskell* (219 U. S. 104) with a meticulous accuracy of the specific facts of the cases but one which quite dwarfs the underlying constitutional attitude of the court. The Supreme Court, in effect, has said that the Constitution does not throw upon the Court the duty of deciding between contesting economic and social claims that may be urged with plausibility in regard to practically every piece of legislation. What the Constitution does is to leave a large margin for legislative experimentation. That is precisely one of the reasons for the existence of a legislature, — to gain social knowledge through experience by using an invention like the minimum wage, which has as much accredited hope behind it as that proposal has. Does Mr. Brown really think that it is constitutional to create administrative machinery, such as is devised by the Massachusetts Minimum Wage Law, in order to ascertain the necessary cost of healthful living for laborers, to make public such a finding, and to bring upon employers the coercive influence of publicity; but that it is unconstitutional to go one further step and enforce by legal means such a finding, at the pain of compelling an industry to go out of business which is not sufficiently efficient to pay its employees enough to sustain them in health? Does Mr. Brown really think that the state has not an interest in the fact that more than sixty per cent of women employed in a given industry are employed at a wage below six dollars a week, when necessary human subsistence cannot be had at less than eight dollars a week, — an interest, that is to say, which rises to the legislative level?

The truth is, Mr. Brown thinks such a situation must be met exclusively by different forms of state interference (see pp. 22–26); the legislatures which have passed the minimum wage laws think otherwise. Mr. Brown thinks there is

an absolute "thou-shalt-not" against trying the experiment. He thinks so because he is permeated, despite his concessions, by certain economic theories which no longer have the absolute sway that he thinks they have. His pages are full of talk about "natural" and "inexorable" laws of supply and demand. The present economic and social thinking and action are less sure that the long-established is necessarily the inexorable. In this economic controversy Mr. Brown is asking our courts to take sides. To the extent that he thinks the Constitution incorporates any specific economic theory, to this extent he would make of the Constitution a more temporal and more partisan document than it is. If his point of view prevailed, "a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held *semper ubique et ab omnibus.*" (Mr. Justice Holmes, in *Otis* v. *Parker*, 187 U. S. 606, 609). Fortunately a larger view of the Constitution is prevailing. So far as constitutional law is concerned, at all events, we are getting away from the notion that the commandments were given to Moses at Manchester. F. F.

OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY. Edited by Paul Vinogradoff. Vol. IV. The History of Contract in Early English Equity. By W. T. Barbour. The Abbey of Saint-Bertin and Its Neighborhood, 900–1350. By G. W. Coopland. Oxford: The Clarendon Press. 1914. pp. vii. 236, 166.

The first of these two essays furnishes the legal contribution to the fourth volume of Professor Vinogradoff's series. Herein Professor Barbour discusses the history of contract in chancery in the fifteenth century, based on an original investigation in the petitions to the chancellor in the Public Record Office. This discussion is preceded by a brief review of contract at common law. He has, of course, not been able to examine the some 300,000 petitions and cases from Richard II. to the early years of Henry VIII., but has made a judicious selection and has printed a number of them in the appendix. The treatment consists of a careful classification of the instances in contract in which the chancellor took jurisdiction. The classification of the petitions is as follows: Petitions brought in chancery despite the existence of a remedy at common law in theory; relating to obligations under seal; for the recovery of debts; for the recovery of personal property; against vendors of chattels; against vendors of lands; marriage settlements; partnership; agency; guarantee and indemnity; general. His generalization, stated with some hesitancy, is that the chancellor did not confine his jurisdiction in enforcing parol agreements to cases where there was a tort to the plaintiff or unjust enrichment of the defendant, as Professor Ames has suggested. Rather, the chancellor asked whether the promisor had made such a promise as in reason and conscience he ought to perform. A bare promise was perhaps not enough without more. His inquiry was whether the enforcement of the promise would further some general interest. Herein the attitude was the reverse of the contemporary common law, which looked primarily at the promisee and compelled him to show facts amounting to a deceit.

That the chancellor acted with a very free hand in granting early petitions in accordance with a good conscience, is clear from the calendars and early reports. Petitions were fashioned for widely different reasons; compare the petition in *Dodd* v. *Browning* (1 Cal. Proc. Chan. xiii., Temp. Henry V.), where the petitioner asked for relief as an old servant of the chancellor. Relief granted